that the authority was given statutory power to dismiss him and that the dismissal was an act done "in pursuance or execution .... of any Act of Parliament."

Also in *Compton* v. *West Ham Borough Council*[3] a senior law officer appointed by the Council which they were bound to make under statutory authority, claimed for salary during the period he was absent owing to illness. It was held that, if a local authority commits any breach of a contract which, under an Act of Parliament, it is its duty to make, then it can claim the protection of the Public Authorities Protection Act.

In both of these cases the default lay on the authority in failing in their duties imposed by statutes, that is positive duties, to carry out those duties which had been laid upon them and they were thus default committed in the execution of their duties. As was clearly put by Lord Buckmaster I.C. in *Bradford Corporation* v. *Myers*[4] at page 247:

"In other words, it is not because the act out of which an action arises is within their power that a public authority enjoys the benefit of the statute. It is because the act is one which is either an act in the direct execution of a statute, or in the discharge of a public duty, or the exercise of a public authority....

It assumes that there are duties and authorities which are not public, and that in the exercise or discharge of such duties or authorities this protection does not apply."

It is to be noted in the present case that unlike the above cases, there is no suggestion that the defendant had acted in the exercise of his public duty or authority when he wrote the memorandum concerned. He might have acted in the capacity of his general duty as head of the Department where the plaintiff was serving. But there is no statute positively conferring him with this duty or authority to place the plaintiff on secondment or transfer him to the Kuching Water Board. The fact that the plaintiff had to exercise an option before his transfer could take effect would suggest that the defendant had no such duty or authority. In my view the defendant had not, in these circumstances, acted in exercise of his public duty or authority as to entitle him to the protection of the Ordinance.

Having said earlier that other reliefs sought by the plaintiff are interrelated with this action for malicious falsehood and having decided that this action is sustainable by reason that the Public Authorities Protection Ordinance does not apply, it follows that the action should be allowed to proceed to trial. Nevertheless I will deal with the question whereby this motion was made, that is, to set aside the writ as frivolous and vexatious under Order 25 rule 4 of the Rules of Supreme Court, 1957 which is as follows:

"4. The court of a judge may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the court or a judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just."

The plaintiff's statement of claim properly sets out the facts in support of his claim for damages arising out of the alleged malicious falsehood directed against him. He also seeks declarations of his rights to certain salary and leave consequent upon the alleged termination of his services by the defendant. These claims are supported by facts which if true would prove his claim. It would thus appear that the statement of claim raises triable issues. These issues could only be determined by proper trial of the action. On the application of this rule 4 Order 25 Lindley L.J. in Attorney General of the *Duchy of Lanscaster* v. *London and North Western Railway Co.*[5] at page 276 said:

"To what extent is the court to go on inquiring into difficult questions of fact or law in the exercise of the power which is given it under Order XXV., rule 4? It appears to me that the object of the rule is to stop cases which ought not to be launched — cases which are obviously frivolous or vexatious, or obviously unsustainable; and if it will take a long time, as is suggested, to satisfy the court by historical research or otherwise that the County Palatine has no jurisdiction, I am clearly of opinion that such a motion as this ought not to be made. There may be an application in Chambers to get rid of vexatious actions; but to apply the rule to a case like this appears to me to misapply it altogether."

A. L. Smith also in the same case said at page 278:

"I only want to make one remark about Order XXV., rule 4. It seems to me that when there is an application made to strike out a pleading, and you have to get to extrinsic evidence to show that the pleading is bad, that rule does not apply. It is only when upon the face of it it is shown that the pleading discloses no cause of action or defence, or that it is frivolous and vexatious, that the rule applies."

This principle has been accepted by the Federal Court in *Tio Chee Hing* v. *Tractors Malaysia Bhd.*[6]

For these reasons it is in my judgment that this action is not frivolous and vexatious and should be allowed to proceed to trial. In the event this motion is refused with costs.

Motion refused.

FAN YEW TENG v. SETIA USAHA, DEWAN RA'AYAT & ORS.

[O.C.J. (Mohamed Azmi J.) March 12, 1975]
[Kuala Lumpur — Originating Summons No. 68 1975]

Elections — Member of Parliament — Conviction and fine — Whether automatically render his seat vacant — Federal Constitution, arts. 44, 48(1)(e), 50(1) and 53.

The plaintiff was returned as a member of parliament for Menglembu in August 1974. On January 13, 1975 he was convicted in the High Court for an offence under the Sedition Act and was sentenced to a fine of $2,000 or six months imprisonment ([1975] 1 M.L.J.). On the same day, he appealed against the said decision and the appeal is now pending in the Federal Court. By the letter dated February 4, 1975 the first defendant informed him that on his conviction and sentence aforesaid he had become disqualified under article 48(1)(e) of the Federal Constitution and by virtue of article 50(1) his seat had become vacant. By writ of election dated February 17, 1975, the Secretary to the Election Commission directed the Returning Officer for the Parliamentary Constituency of Menglembu to proceed with the by-election of the said constituency. The required notice under the Elections (Conduct of Elections) Regulations, 1959 was published in the Utusan Malaysia newspaper on February 20, 1975. The main issue for determination in this case was whether the plaintiff's conviction and fine of $2,000 in default six months' imprisonment automatically rendered the plaintiff's seat vacant in the Dewan Ra'ayat having regard to the provision of article 53 of the Constitution.

Held: (1) the plaintiff's seat did not become vacant automatically merely because he had been convicted by the High Court and fined $2,000 and had not received a free pardon. He was entitled to exhaust his legal rights just as the House

of Representatives was entitled to decide as to his disqualification at any time it deemed fit once the question of his disqualification was raised, although in what circumstances it was raised were not at all relevant:

(2) the Election Commission and the Returning Officer for the Parliamentary Constituency of Menglembu could not legally hold a by-election for the Parliamentary Constituency of Menglembu on the ground that no vacancy of seat had occurred in the aforesaid constituency.

Cases referred to:-

(1) *Brundaban* v. *Election Commission* A.I.R. 1965 S.C. 1892.

(2) *R. Sivasankara* v. *Election Commission of India* A.I.R. 1968 Mad. 234 @ 235.

ORIGINATING SUMMONS.

Karpal Singh with *Ngan Siong Hing* and *Henry Lee* for the plaintiff.

Abu Talib bin Othman with *Lim Beng Choon* (Senior Federal Counsel) for the defendant.

Mohamed Azmi J.: The brief facts of this case, as disclosed in the affidavits, are as follows. The plaintiff, Mr. Fan Yew Teng, was returned as a Member of Parliament for the Parliamentary Constituency of Menglembu in the General Election held in August 1974. On January 13, 1975 he was convicted in the High Court at Kuala Lumpur and sentenced to a fine of $2,000 or six months imprisonment for an offence under section 4(1)(c) of the Sedition Act (Revised 1969). On the same day, he appealed against the said decision and the appeal is now pending in the Federal Court. By letter dated February 4, 1975 he was informed by the Setia Usaha, Dewan Ra'ayat (first defendant) presumably acting on the direction of the Speaker, that on his conviction and sentence aforesaid he had become disqualified under article 48(1)(e) of the Federal Constitution, and by virtue of article 50(1) his seat had become vacant. By writ of election dated February 17, 1975, the Secretary to the Election Commission directed the Returning Officer for the Parliamentary Constituency of Menglembu to proceed with the bye-election of the said constituency. The required notice under regulation 3(1) of the Elections (Conduct of Elections) Regulations, 1959 was published in the February 20, issue of Utusan Malaysia newspaper.

The main issue for determination in this case is whether the plaintiff's conviction and fine of $2,000 in default six months' imprisonment on January 13, 1975 automatically rendered the plaintiff's seat vacant in the Dewan Ra'ayat (House of Representatives) having regard to the provision of article 53 of the Federal Constitution.

By article 44 of the Federal Constitution, it is provided that the legislative authority of the Federation shall be vested in a Parliament, which shall consist of the Yang Dipertuan Agung and two Majlis (Houses of Parliament) to be known as the Dewan Negara (Senate) and the Dewan Ra'ayat (House of Representatives).

The relevant provisions to be considered in this case are articles 48(1)(e), 50(1) and 53 of the Federal Constitution. Article 48(1)(e) provides:

"Subject to the provisions of this Article, a person is disqualified for being a member of either House of Parliament if

he has been convicted of an offence by a court of law in the Federation (or, before Malaysia Day, in the territories comprised in a Borneo State or in Singapore) and sentenced to imprisonment for a term of not less than one year or to a fine of not less than two thousand dollars and has not received a free pardon."

Article 50(1) provides:

"If a member of either House of Parliament *becomes* disqualified for membership of that House his seat shall become vacant."

Article 53 provides:

"*If any question arises* whether a member of a House of Parliament *has become* disqualified for membership, the decision of that House shall be taken and shall be final: Provided that this Article shall not be taken to prevent the practice of the House postponing a decision in order to allow for the taking or determination of any proceedings that may affect the decision (including proceedings for the removal of the disqualification)."

As far as article 48(1)(e) is concerned, there can be no dispute that the plaintiff has been sentenced to a fine of not less than $2,000 and nor has he received a free pardon. It is therefore the contention of learned counsel for the defendants that once a member of the House of Parliament has been convicted and sentenced to a fine of not less than $2,000 and has not received a free pardon, he becomes disqualified under article 48(1) and his seat shall become vacant by virtue of article 50(1). Learned counsel for the plaintiff, however, argues that the plaintiff's conviction and sentence alone are not sufficient to disqualify him from his continued membership of the Dewan Ra'ayat and that the plaintiff is entitled to show cause against any move to exclude him from the Dewan under article 53 of the Federal Constitution. As to article 53, learned counsel for the defendants argues that it only applies in cases where the disqualification is doubtful, but does not apply in the present case where the disqualification is a straight-forward one.

Before going into the merits of the conflicting arguments, it is necessary to appreciate that article 48(1) applies to both pre-election and as well as to post-election disqualification. In short, any person who comes within one of the sub-clauses (a) to (f) of this article, will not be fit to be a candidate for membership of the Dewan Ra'ayat or be an appointee of the Dewan Negara; and further, if a sitting Member of Parliament incurs any of the disqualification mentioned in the aforesaid sub-clauses, and no question arises as to his disqualification, he will be disqualified.

Secondly, it is clearly obvious that articles 50(1) and 53, as opposed to article 48(1), apply only to post-election disqualification, *i.e.* disqualification arising after election of a person to the House of Representatives or appointment to the Senate.

Thirdly, it is also essential to bear in mind that, unlike the constitution of some countries with parliamentary system of government, our Constitution does not confer on the House of Representatives the power to decide elections in disputes, but only questions relating to the disqualification of members. In the case of an election to the House of Representatives, the question of pre-election disqualification including the question of an election on the ground of disqualification of a candidate is given to the High Court under article 118, and if the disqualification is established, the election shall be void under article 50(2).

Based on the above general observations, and having regard to the clear and unambiguous words used in the relevant articles under consideration, for the purpose of determining whether the plaintiff's seat in the Dewan Ra'ayat is automatically vacant by virtue of his conviction and sentence, it is imperative for the court to consider whether a question or dispute has arisen, and for this purpose not only the provisions of articles 48(1)(e) and 50(1) but also the provision of article 53 are relevant. I agree with the submission of counsel for both parties the two Houses of Parliament are supreme and, if that is so, it follows that they should have the right to decide for themselves whenever a question or dispute arises as to membership amongst their members. I also agree with the submission of learned counsel for the defendants that in construing the relevant articles in the Constitution the court must try to give a sensible meaning of all the words. It is also a well established canon of construction that the court should not substitute what it thinks is Parliament's intention in the place of the clear meaning of the words used so that it is not for the court to assume that Parliament has used certain words idly. Unless it is impossible to do so, the court must give effect to every word used in the Constitution. Applying this principle to the present case, it is my conclusion that the mere fact that a Member of Parliament has been convicted and sentenced to a fine of not less than $2,000 and has not received a free pardon does not render his seat vacant automatically in all cases under article 50(1). In my view, where a member has appealed against his conviction and sentence, the matter becomes *sub judice* and accordingly a question or dispute has arisen as to his disqualification, and as such it is wrong to consider articles 48(1)(e) and 50(1) only without regard to the provision of article 53. It is my finding that where a question or dispute has arisen whether a Member of Parliament has become disqualified, the seat of that particular member shall only become vacant when he becomes disqualified and the power to decide whether he has become disqualified or not clearly rests with the Dewan to which he belongs by virtue of article 53. There can be no doubt that article 48(1)(e) can only be read in isolation in pre-election disqualification, but for post-election disqualification it is not all that simple. From the wordings of article 53, the decision of the House of Representatives shall be taken if any question arises whether a member of the House has become disqualified and its decision shall be final. Unless and until the House decides the plaintiff has been disqualified in the present case, the question of vacancy of his seat shall not arise under article 50(1). In short, article 50(1) must be read with article 53. I regret to say that I am not impressed with the argument of learned counsel for the defendants that it is only where there is a doubt article 53 will apply. It has been suggested that it is only in cases where for instance a member has obtained a free pardon that a question is said to have arisen under article 53 and it is only in that instance that the House will decide. To my mind, there is no justification for that interpretation. If it is the intention of the Constitution to confine article 53 to doubtful cases only, then it would have said so clearly. The important words to consider in that article are, "If any question arises". In this connection, it is relevant to quote article 103(1) of the Constitution of India which provides:

> "If any question arises as to whether a member of either House of Parliament has become subject to any of the disqualification mentioned in clause (1) of Article 102, the question shall be referred for the decision of the President and his decision shall be final."

The wordings of this article are somewhat similar to our article 53 except that in our case it is the House of Representatives or the Senate which is given the power to decide; whereas in India that power is given to the President, and in the case of State Legislature it is given to the Governor. [See article 192(1)]. Further, the equivalent to our articles 48(1) and 50(1) in the Constitution of India are articles 102(1) and 101(3) respectively. However, there are vital differences between the position here and in India pertaining to these two articles. In dealing with article 103(1), it is stated in Basu's Commentary on the Constitution of India, Volume 2, 5th Edition, at page 578, that one of the three conditions for the application of this clause is that a question as to disqualification has arisen. The clause, however, does not lay down where, by whom and in what manner the question should arise. It is not necessary that it should arise in the legislature itself. In the present case, it has been raised by the plaintiff himself and, accordingly, article 53 comes into operation. In *Brundaban* v. *Election Commission*[1] which concerns the disqualification of a member of a House of the Legislature of the State, it was held that what the first clause of article 192(1) — which is in similar terms with article 103(1) — requires, is that a question should arise; how it arises, by whom it is raised, in what circumstances it is raised, are not relevant for the purpose of the application of this clause.

Further, in *R. Sivasankara* v. *Election Commission of India*[2] it was held that the jurisdiction to decide the question of disqualification under article 191(1) [regarding disqualification for membership of the State Legislature] of the Constitution vests exclusively in the Governor and no court has got jurisdiction to go into it, whether in writ proceedings or otherwise. Next, a sitting member gets the opportunity to put forward his objection to alleged disqualification at an enquiry which is to be held by the Election Commission before the latter forwards its opinion under article 192(2) to the Governor. When such an opportunity has been afforded by the Election Commission and the Election Commission has come to a decision on the disqualification and conveyed his opinion about it to the Governor and the Governor has acted upon that opinion and disqualified the member there can be no more occasion for the court to question the decision, either on account of its merits or on account of the member not having been given proper opportunity to show cause, if in fact, the Election Commission has given the necessary opportunity. Although there is no similar provision in this country as in India where the President or Governor is required to obtain the opinion of the Election Commission before arriving at a decision on questions as to disqualification of members, by analogy it is the contention of learned counsel for the plaintiff that Dewan Ra'ayat or Dewan Negara should before making a decision as to disqualification give the member alleged to be disqualified an opportunity to be heard. Whilst I hesitate to agree with the whole of

this proposition, I find it abundantly clear that once a question has arisen as to disqualification, the mere fact that a member has been convicted and sentenced to a fine of not less than $2,000 and has not received a free pardon under article 48(1)(e) does not automatically render his seat vacant under article 50(1) for the simple reason that article 53 gives the House of Parliament the over-riding power to make decision as to the disqualification. I find no other provision in the Constitution to suggest that the power to decide on question of disqualification being given to any other body or person. In my view, the power given to the House of Parliament under article 53 is so clear and over-riding that it can be exercised even where a member of the House has not fully exhausted his legal rights after he has been convicted and sentenced to a fine of not less than $2,000 and has not received a free pardon. Under the *proviso* of that article, it is, of course, open to the House to postpone a decision in order to allow for the taking or determination of any proceedings that may affect its decision including proceedings for the removal of the disqualification of the member concerned.

In my respectful view, the opinion expressed by Suffian F.J. (as he then was) in his book entitled "An Introduction to the Constitution of Malaysia" at page 55 is well founded. There His Lordship has this to say:

"If a member of either House becomes disqualified for membership of that House, article 50(1) says that 'his seat shall become vacant'. It does not appear, howeper, that if, for instance he is declared a bankrupt, he automatically ceases to be a member, for article 53 provides that if any question arises whether a member has become disqualified for membership, the decision of the House shall be taken and shall be final. Court proceedings may, however, be taken that may affect the decision and thereby the matter becomes *sub judice* or an application may be made to the Yang Dipertuan Agung to remove certain disqualifications; in either event the House may, if it likes, postpone a decision to allow such proceedings or applications to be taken or made and determined."

On the first issue, I hold that the plaintiff's seat in this case does not become vacant automatically merely because he has been convicted by the High Court and fined $2,000 and has not received a free pardon. He is entitled to exhaust his legal rights just as the House of Representatives is entitled to decide as to his disqualification at any time it deems fit once the question of his disqualification is raised, although in what circumstances it is raised are not at all relevant.

The second issue raised by the plaintiff is that, even assuming that his seat is now vacant, the period of vacancy should run from January 13, 1975 when he was convicted and sentenced, and the Writ of Election dated February 17, 1975 is accordingly null and void and of no effect on the ground that it was issued not within the time specified in section 12(3) Elections Act, 1958 (Revised — 1970) which provides that a writ shall be issued not earlier than ten days and not later than thirty days from the date on which it is established that there is a vacancy; and in this case, it is argued that the writ was issued more than thirty days from the date on which it is established that there is a vacancy. Further, polling day has been fixed on March 15, 1975 and it is also argued that this also contravenes the provision of article 54(1) of the Constitution which requires that such vacancy shall be filled within sixty days from the date on which it is established that there is a vacancy. There is no dispute that for the purpose of issuing the writ of election as required by section 12(3) of the Elections Act, the period must be calculated to run on the date on which the vacancy is established. The only issue is: when is the date of the establishment of the vacancy? According to the plaintiff, it is the date of his conviction and sentence (January 13, 1975); but according to the Election Commission (second defendant), the establishment of the vacancy is February 4, 1975, *i.e.* the date on which the Commission was informed by the Setia Usaha, Dewan Ra'ayat (first defendant), regarding the vacancy of the Parliamentary Constituency of Menglembu. The question of validity or otherwise of the writ, therefore, depends on the date of the establishment of the vacancy. Having regard to my finding on the first issue, I am of the view that this second issue is only of academic interest. Since it is my finding that the plaintiff's seat is still not vacant, it follows that the writ of election should not have been issued in the first instance and, accordingly, it is unnecessary for me to decide whether or not the writ is null and void. However, it would appear the date of establishment of the vacancy in this case should be taken as February 4, 1975 when the Election Commission was officially informed of the vacancy. Be that as it may, even if it can be established that the writ was issued out of time, in my view, failure to comply with the requisite period is a mere irregualrity since the Elections (Conduct of Elections) Regulations, 1959 (L.N. 69 of 1959) allows the Election Commission to issue a new writ under certain circumstances. As such, I do not think this is a proper matter where the court should exercise its discretion by granting a declaration as contained in terms of prayers (3) and (4) of the Originating Summons.

As regards prayer (2), I agree with learned counsel for the defendants that the declaration sought is in respect of an administrative matter; and again, in my view, I do not think I should exercise my discretion in favour of the plaintiff.

Under the circumstances, I hereby make the following orders: —

(1) It is declared that the plaintiff's conviction and fine of $2,000 (vide Selangor Criminal Trial No. 6 of 1974) does not automatically render the plaintiff's seat vacant in the Dewan Ra'ayat Malaysia.

(2) It is declared that the Election Commission and the Returning Officer for the Parliamentary Constituency of Menglembu cannot legally hold a bye-election for the Parliamentary Constituency of Menglembu on the ground that no vacancy of seat has occurred in the aforesaid constituency.

(3) Costs of this application be paid by the defendants.

Order accordingly.

Solicitors: *Karpal Singh, Wong & Co.; Lewis & Co.; Ling & Lee.*